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The Council on Environmental Quality

Attn: Horst Greczmiel

722 Jackson Place, NW

Washington, DC 20503

Email: [www.whitehouse.gov/webform/submitcomments-draft-guidanceprogrammatic-nepa-reviews](http://www.whitehouse.gov/webform/submitcomments-draft-guidanceprogrammatic-nepa-reviews)

**RE: EFFECTIVE USE OF PROGRAMMATIC NEPA REVIEWS**

Dear Mr. Greczmiel:

On behalf of Public Lands Advocacy (PLA), following are comments in response to the Notice of Availability and Request for Public Comments on Draft Guidance on Effective Use of Programmatic National Environmental Policy Act (NEPA) Reviews published in the Federal Register on August 25, 2014 and posted on the Council on Environmental Quality's (CEQ) website on August 22, 2014. PLA is a nonprofit trade association whose members include independent and major oil and gas producers as well as nonprofit trade and professional organizations that have joined together to foster environmentally sound exploration and production on public lands. PLA and its members have had broad experience in working with federal agencies as they prepare a wide variety of NEPA compliance documents, including programmatic reviews. We welcome this opportunity to provide you with our insight regarding this draft guidance document.

**GENERAL**

We appreciate that CEQ recognizes the need to clarify the intent of NEPA and the analytical foundation necessary to ensure NEPA compliance. While we recognize that programmatic NEPA reviews may have varying utility with respect to the federal programs they delineate, explicit guidance regarding the specific elements that must be included in order to meet the intended purpose of the analysis as well as public expectations is a positive step in the right direction. We are particularly pleased that CEQ envisions a more consistent approach to programmatic NEPA reviews along with the requirement for full documentation and public availability of studies, inventories and other information relied upon during the analysis process. Overall, the draft guidance is well conceived and will certainly prove useful to all parties involved in the NEPA process.

While we support the process improvements outlined by CEQ, we ask that the guidance also include direction that programmatic NEPA analyses should not be used as a means of deferring or delaying project level NEPA analyses. In addition, if it is anticipated that the landscape oriented programmatic documents will be even more voluminous than current programmatic documents, we recommend that the comment periods be extended by another 45 days beyond the current 45 days to 90 days as currently provided, depending on the type of NEPA document. We also ask that CEQ advise the agencies that if several programmatic documents are going to be released simultaneously, that the comment periods for such documents also be extended to allow interested parties adequate time to review them.

One last observation is that the guidance should clearly state that NEPA does not require federal agencies to select the most environmentally protective course of action. Rather, NEPA was crafted to establish the procedures for environmental analysis to aid federal agencies in making informed decisions regarding anticipated impacts of a federal action and to publicly disclose those decisions and their effects on the environment.

These comments are identified by page and section and address both the *Federal Register* notice as well as the paper “*Modernizing the National Environmental Policy Act: Taking Steps to Improve Efficiency*” posted on CEQ’s website.

## **Federal Register Notice**

### Page 50582 - Determining the Utility and Scope of the Programmatic NEPA Review

*“Agencies should carefully consider, as early as practicable, the benefits of making the initial broad decisions and the amount of effort required to perform the programmatic review to ensure that using the programmatic approach facilitates decision-making and merits the investment of time and effort... For example, a programmatic NEPA review may serve as an efficient mechanism to describe Federal agency efforts to adopt sustainable practices for energy efficiency, reduce or avoid greenhouse gas emissions, reduce petroleum product use, and increase the use of renewable energy including bioenergy, as well as other sustainability practices.”*

**COMMENT:** While we understand CEQ has attempted to provide an example of when it may be necessary to analyze the particular effects of a proposed action at a broader scale, we object to the example used because it indicates a preconceived notion that CEQ has found the actions described are typically warranted and necessary. As previously noted in these comments, NEPA does not require federal agencies to select the most environmentally protective course of action.

## **“Modernizing the National Environmental Policy Act: Taking Steps to Improve Efficiency”**

### Page 9 - III When to use a programmatic and tiered NEPA review

*Programmatic NEPA reviews can facilitate decisions on matters that precede site- or project-specific implementation, such as mitigation commitments for subsequent actions, or narrowing of future alternatives.*

**COMMENT:** We strongly support the concept of tiering to existing NEPA documentation, whether it is programmatic or project specific. We also agree that when tiering to a previously adopted NEPA review, it is unnecessary to reanalyze a full range of alternatives because it would be needlessly costly and time-consuming without any added benefit. This is an important consideration when it is determined the agency must prepare a site- or project-specific NEPA analysis subsequent to adoption and implementation of a programmatic NEPA review.

However, we ask CEQ to address the utility of a Determination of NEPA Adequacy (DNA) when tiering to a previously adopted decision document. If all the relevant issues have been satisfactorily addressed in an existing NEPA analysis, there should be no need to rehash the issues in a new analysis.

*A programmatic NEPA review may be appropriate when the action being considered falls into one of the four major categories of actions to which NEPA can apply:*

- *Adopting Official Policy*
  - *Rulemaking at National- or regional-level;*
  - *Adoption of an agency-wide policy; or*
  - *Redesign of an existing program.*

**COMMENT:** The guidance indicates only that programmatic NEPA review “may be appropriate” in the listed circumstances. It does not specify under what circumstances a programmatic review may not be appropriate. This is of particular interest because we believe a programmatic NEPA analysis must be required for all of the actions listed above. BLM has recently implemented several extensive policy changes that constitute significant alteration of historical policies and programs. A case in point is the Regional Mitigation Manual Section (MS) 1794 and BLM Instruction Memorandum (IM) 2013-142. The Draft MS describes regional mitigation as “a landscape-scale approach to mitigating impacts to resources and values managed by the BLM, from authorizations approved by the BLM...A regional approach to mitigation occurs across the landscape and focuses on attaining the highest mitigation benefit, regardless of land ownership.” Both the IM and the Draft MS create profoundly altered policies and procedures that would impose newly created regional off-site mitigation strategies on public land users. Clearly, imposition of a new requirement for regional mitigation exceeds the mandate of existing regulations or statutes through new policy interpretation. Therefore, we strongly support CEQ’s recommendation on Page 11 that agencies give particular consideration to preparing a PEA or PEIS when: (1) initiating or revising a national or regional rulemaking, policy, or program; (2) adopting a plan for managing a range of resources; or (3) making decisions on common elements or aspects of a series or suite of closely related projects.

#### **IV. Practical Considerations for Programmatic Reviews and Documents**

##### **A. Determining the Utility and Scope of the Programmatic NEPA Review, 3. The Proposed Action**

Page 17 - *Agencies may prepare a single NEPA document to support both programmatic and project-specific proposals.*

**COMMENT:** On its face, it would seem that CEQ’s position that agencies can prepare a single NEPA document which supports both programmatic and project-specific programs is reasonable. However, in so doing it must be possible to avoid delays in the project-specific analysis while analyzing programmatic goals. Typically, programmatic NEPA is broader in scope than a proposed project. If the programmatic analysis will exceed the scope of a project level analysis, we strongly recommend that they be conducted separately. If it can be clearly demonstrated that no delay in the project analysis and approval would occur, we support the direction that the agency must clearly define applicable decisions, e.g., specify which decisions will be made based directly on the PEA/PEIS and articulate the decisions being made based upon the analysis of impacts and alternatives related to the project- or site-specific proposal. As long as the agency provides adequate specificity regarding decisions being made and the level of analysis being conducted, the process could be reasonably streamlined. However, it is crucial to ensure that this approach would not result in a delay of a project-level decision pending completion of programmatic analysis.

##### **B. Collaboration, Public Engagement, and Coordination with Other Environmental Reviews**

## 1. Importance of Collaboration and Coordination

Page 20 - *Collaboration and cooperation among Federal agencies, tribes, and state and local governments is especially critical for successful completion of meaningful programmatic NEPA reviews.*

**COMMENT:** We concur that collaboration and cooperation among federal agencies, tribes and state and local governments is essential. However, we note that often what is termed by the agencies as collaboration and cooperation is less than meaningful. For example, it is not uncommon for some agencies to wait until programmatic analyses are literally ready for print before engaging local governmental representatives. In these cases, they failed to collaborate with local communities even though local governments often have significant financial interests that have not been adequately considered, not to mention site-specific resource information which could significantly improve the NEPA analysis. Therefore, we recommend that CEQ specify in this guidance that thorough collaboration should be undertaken at the earliest stage of analysis in order to take advantage of the general and site-specific knowledge these bodies have to offer as well as their financial interest in the program area. While the guidance states, “*Scoping early in the process provides agency decisionmakers with access to other agencies’ and governments’ expertise and can help agencies identify broad scale issues, develop alternatives for analysis, identify the appropriate temporal and spatial parameters, and determine the appropriate depth of analysis or level of detail for the NEPA review,*” we recommend instead that local governmental bodies be offered cooperator status at the preplanning stage of NEPA because once an agency is ready for scoping, most decisions as to the scale of the analysis have already been made without benefit of additional insight from cooperators. Early involvement by local governments is consistent with 40 CFR § 1501. 7.

Another recommendation regarding collaboration during the various stages of preparation of a NEPA analysis is that discreet time frames for comments and input need to be imposed. Thirty to forty-five days should provide adequate opportunity for input on specific issues aside from the official comment period provided for an environmental assessment for impact statement. If no response is received within that period, agencies must have the authority to move forward with their plans or proposals. An example would be when an agency requests feedback from a State Historic Preservation Officer on a cultural site. If no feedback is received within the allotted time, the federal agency must be allowed to proceed in accordance with its plan.

Page 21 - *Stakeholders for a programmatic review may span multiple states and large areas. Consequently, public engagement should be well thought through to include all the potentially interested Federal and state agencies, tribes, local governments, private organizations, and individual citizens.*

**COMMENT:** We note that footnote 27 recommends that the agencies contact NGOs and citizens groups. Contact with such groups will not reach all interested parties. Therefore, we recommend that the footnote be revised to include a broad range of trade associations and other user groups because their members will likely have similar interest in the proposed NEPA process.

## C. Preparing the Documents

### 2. Level of Detail in Programmatic NEPA Documents

Page 25 - *The PEA or PEIS must provide sufficient detail to foster informed decision-making that reflects broad environmental consequences from a wide-ranging federal program.*

### 3. Depth of Impact Analysis in Programmatic NEPA Documents

Page 26 - *The agency is obligated to conduct a meaningful impact analysis in accordance with NEPA, and that analysis should be commensurate with the nature and extent of potential impacts of the decision being made.*

**COMMENT:** The draft guidance indicates agencies are obligated to conduct a meaningful impact analysis which contains sufficient discussion of the relevant issues and opposing viewpoints to enable the decisionmaker to take a “hard look” at the environmental effects in order to make a reasonable choice among alternatives. It has been rare for consideration of opposing viewpoints to be included in any NEPA analyses to date. Typically, the agencies use only that information which supports their planned adoption of a particular alternative. Additionally, federal agencies tend to allow litigation threats and lobbying from NGOs to drive the preferred alternative rather than science and compliance with multiple-use statutes, such as the Federal Land Policy Management Act (FLPMA) and the Multiple-Use and Sustained Yield Act (MUSYA). We support the direction that all views be considered, provided that clearly documented scientific data is relied upon to inform the analysis.

Additionally, we recommend that CEQ include a section that more broadly applies the requirements of 40 CFR 1502.21, Incorporation by Reference. The regulation indicates that materials cited and incorporated by reference in the environmental review must be reasonably available for inspection within the time allotted for public comment. This requirement needs to be applied to all information used in the analysis, not just that which is incorporated by reference. In the programmatic documents we have reviewed, there is often little, if any, documentation provided which justifies many of the resource allocations being proposed in accordance with the alternatives. For example, BLM identifies stipulations or conditions of approval that will be imposed on future leases. However, typically there is very limited discussion as to why these stipulations or conditions are actually needed throughout all the areas to which they would be applied. The same is true in situations where the agency may identify areas that will be devoted to specific resources by alternative. There is no discussion as to why there is such a large discrepancy among alternatives for these areas or how they have been delineated. The purpose of NEPA, whether programmatic or site-specific, is to provide the public with a full accounting of the agency’s rationale for certain management options under consideration and how they will be implemented based upon reasonably available information. We hope that CEQ can make it clear in this guidance that data used to make allocation or other use decisions must be made available to reviewers of the NEPA analysis.

Page 27 - *The scope and range of impacts may also be more qualitative in nature than those found in project- or site-specific NEPA reviews.*

**COMMENT:** We understand that it may be difficult to accurately discern the scope and range of impacts in a programmatic document. However, we urge CEQ to clarify that all such projections must be based upon sound science which is made available to the reviewing public.

## V. Subsequent Proposal-Specific NEPA Reviews

### B. Tiering NEPA Reviews

Page 35 - *One of the main advantages of a programmatic NEPA review is the ability to tier to subsequent reviews, such as site- or proposal-specific reviews*

**COMMENT:** The ability to tier environmental documents is a useful tool in streamlining the review process. We support CEQ's clarification that an EIS may be tiered to an EA as long as the EA conducted a "hard look" at the environmental consequences of a proposed action. We also particularly support the guidance where it states that if a document is to be tiered to a previous review, the agency is required only to analyze new impacts that were not previously addressed.

C. New Information and Supplementing Documents

*Page 38 - The agency is responsible for making a reasoned determination whether new information raises significant new circumstances or information regarding environmental impacts or involves substantial changes in the actions decided upon in the programmatic analysis.*

**COMMENT:** With respect to new information arising after a programmatic NEPA document has been implemented, we point out that new information could not only result in the need for more restrictive management, it could also demonstrate the anticipated impacts from a federal action are significantly less than expected. If such a situation does arise, a supplement to the original document should be untaken.

**CONCLUSION**

Coupled with the recommendations described above in these comments, this draft guidance is a welcome addition to CEQ's direction for managing the NEPA process. We appreciate this opportunity to provide you with our views and concerns. Please do not hesitate to contact me if you would like to discuss these comments in detail.

Sincerely,

A handwritten signature in cursive script that reads "Claire Moseley".

Claire M. Moseley